In the Supreme Court of the United States

OCTOBER TERM, 1976

Case No. 76-496

BENSON A. WOLMAN, ET AL.,
Plaintiffs-Appellants,

v.

MARTIN W. ESSEX, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF THE STATE DEFENDANTS-APPELLEES

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STATEMENT OF THE CASE

This action was instituted by several citizens and taxpayers of the State of Ohio to challenge the validity of Section 3317.06 of the Ohio Revised Code. They contend that the statute constitutes a law respecting an establishment of religion which is prohibited by the Establishment Clause of the First Amendment.

Section 3317.06, *supra*, provides certain specified forms of assistance to students in non-public schools. The statute is set forth in the appendix to the Brief for Appellants.

The statute authorizes the expenditure of monies by local school districts to purchase secular textbooks which have been approved for use in the public schools and loan them to students attending non-public schools; purchase secular, neutral and non-ideological instructional materials and equipment which are used in the public schools and loan them to students attending non-public schools; provide certain specified diagnostic and health services to students attending non-public schools; provide certain specified auxiliary and remedial services to students attending non-public schools; supply standardized tests used in the public schools for the use of students attending non-public schools; and provide field trip transportation for students attending non-public schools.

The statute specifically provides that each of its provisions is independent and fully severable. See also: Section 1.50 of the Ohio Revised Code.

The statute limits the materials and services available to those which are available to students attending public schools in the district; provides that the students, in order to be eligible to receive the materials or services, attend schools where admission and hiring policies make no distinction as to race, creed, color or national origin; and prohibits the provision of materials or equipment which are capable of diversion to religious use.

Section 3317.06, *supra*, was enacted, and the statute which previously provided assistance to students in non-public schools was repealed by the Ohio General Assembly, following *Meek* v. *Pittenger*, 421 U.S. 349 (1975), to eliminate those forms of assistance which this Court found constitutionally objectionable in that case.

The State of Ohio has included non-public school students, along with those in public schools, as beneficiaries of certain instructional materials and health and auxiliary services since 1967. The original statute was found constitutional by the Supreme Court of Ohio in *P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971).

The statute providing this assistance for non-public school students was again challenged and found valid in *Wolman* v. *Essex*, Case No. 72-292. The judgment in that case was vacated by this Court and remanded for further consideration in light of the decision in *Meek*. *Wolman* v. *Essex*, 421 U.S. 982 (1975).

Following the remand the District Court by consent order found that statute unconstitutional. The consent order recites that counsel for the defendants did not attempt to distinguish the *Meek case* since the statute involved in that case had already been repealed.

The parties have stipulated that over 250,000 students were educated in non-public schools in Ohio during the 1974-1975 academic year. Approximately 96 percent of these non-public schools are denominational and approximately 86 percent are Catholic. (Stip. 10, App. 28-29).

The parties have also stipulated that the Catholic schools in Columbus, Ohio are fairly representative of Catholic schools throughout the state and that officials of the Columbus Catholic schools, if called upon to testify, would state that the following facts are true concerning their schools. (Stip. 13, App. 30.)

The schools teach the secular subjects required to meet the state minimum standards during the five-hour school day required by such standards. During the classes in which these subjects are taught, the content is generally equivalent to that taught in such classes in the public schools.

The schools have added another half hour to their school day. This added half hour is usually devoted to religious instruction. Discussion of topics upon which the Catholic Church has taken a position are programmed to take place only in the religion classes. If the school schedules a religious function, it is held either during the religion class or after school. (Stip. 13g, App. 31.)

Teachers employed in such schools include members of almost every religious faith and sect. In all probability, however, a majority of the teachers are members of the Catholic Church. (Stip. 13j, App. 33.) Less than one-third of the teachers are members of a religious order. Most members of a religious order have discontinued wearing a distinctive habit while teaching.

Members of some religious orders have taken a vow of obedience. This vow does not require obedience to the Church with reference to what a person teaches in school or how he teaches it. The vow is not concerned with such matters. (Stip. 13d, App. 30.) No teacher is instructed to teach religious doctrine in a secular course or to integrate religious doctrine into such courses. (Stip. 13m, App. 33.)

On July 21, 1976, the three-judge District Court rendered its judgment and opinion upholding the validity of the statute and dismissing the action.

SUMMARY OF ARGUMENT

The State of Ohio has determined that it is in the public interest to improve the quality of education for all children in the state and to provide those children who have educational handicaps the special assistance which they need to proceed at the same educational level as their more fortunate classmates. The General Assembly of Ohio, therefore, adopted legislation in 1967 to provide certain health and special educational services to all children in the state, those in non-public as well as public schools.

This legislation has been amended at times in order to comply with the principles and guidelines set forth in the applicable decisions of this Court. The state officials respectfully submit that the benefits available under Section 3317.06, *supra,* are limited to those which will promote the health and educational opportunities of children attending non-public schools. The benefit, if any, to the schools which these children attend is indirect and incidental.

The state officials, therefore, submit that the statute is constitutional under the three-part test established by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . .; finally, the statute must not foster "an excessive government entanglement with religion." (403 U.S. at 612-613.) (Citations omitted.)

The statute does have a secular legislative purpose. The state has a legitimate interest in the health and education of its children. The statute serves this interest by improving the quality of education throughout the state and by providing students with educational handicaps a meaningful educational opportunity.

The principal or primary effect of the statute neither advances nor inhibits religion. It makes available to all children in the state, those in non-public schools as well as public schools, benefits in the form of secular educational materials and health and remedial services. No benefits whatsoever are provided to sectarian schools.

The statute does not foster an excessive government entanglement with religion. The benefits available under the statute are provided to all students in the state. The only distinction between students attending non-public rather than public schools is the location where they

receive the benefits. The risk of political entanglement is, therefore, minimal. If there is a demand in the future to increase the level of benefits, the proponents will be those who generally favor remedial and special educational benefits for students. Political debate on the question will not be drawn along religious lines.

There is also little risk of administrative entanglement. There is no need for continuing government surveillance. The textbooks, materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.

No services which have any relation to the educational function of a sectarian school will be performed on the school premises. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

The parties have stipulated that the textbooks available under the statute will be limited to books, reusable workbooks or manuals intended for use as a principal source of study material for a given class, a copy of which is expected to be available for the individual use of each pupil in the class. (Stip. 20, App. 35-36.)

This portion of the statute is, therefore, identical to the programs upheld in *Meek* v. *Pittenger, supra,* 421 U.S. 349, and *Board of Education* v. *Allen,* 392 U.S. 236 (1968).

Under the Ohio law it is the school children, and not the sectarian schools, who are the direct beneficiaries of the instructional materials and equipment program. The materials and equipment are loaned to the pupils or their parents upon individual request. The sectarian schools receive nothing.

The materials and equipment are inherently secular and incapable of diversion to sectarian use. This eliminates

the problems caused by programs of financial aid. That type of aid necessarily presents a risk of either advancing religion or fostering excessive entanglement. In the absence of restrictions financial aid could be used to benefit either the educational or religious aspects of the sectarian schools. If restrictions were imposed it would require continuing government surveillance to insure compliance with the restrictions.

The materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.

Appellants have conceded the validity of physician, nursing, dental and optometric services to children attending non-public schools. They claim, however, that the state may not provide diagnostic psychological and diagnostic speech and hearing services.

The parties have stipulated that the persons who perform these services merely identify the children who have speech and hearing handicaps or psychological problems. (Stip. 28(a), (b), App. 39.) These services are clearly public health services. The state may properly include children attending non-public schools in programs providing such services. *Meek* v. *Pittenger, supra,* 421 U.S. 364; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 616.

Therapeutic and remedial services are available to students with learning disabilities who need special assistance in order to proceed at the same academic level as their more fortunate classmates. None of these services will be provided on the premises of a sectarian school. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

The statute provides that the standardized tests and scoring services used in public schools are to be furnished by the local school districts to measure the progress of non-public school students in secular subjects. (Stip. 37, App. 48.)

The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

This portion of the statute bears a superficial similarity to the program found invalid in *Levitt* v. *Committee For Public Education,* 413 U.S. 472 (1973), since both are concerned with tests. The programs, however, are readily distinguishable. In *Levitt* the state provided money grants to the non-public schools to reimburse them for testing. Money grants necessarily present a risk of either advancing religion or fostering excessive entanglement. (413 U.S. at 477.) No financial aid is involved in Ohio. The tests themselves are provided.

In *Levitt* the vast majority of the money grants was used to reimburse the schools for teacher prepared tests. Such tests are an "integral part of the teaching process." Since the tests were prepared by teachers under the authority of a sectarian institution it creates the risk that they would draft the tests with a view to advancing the religious beliefs of the sponsoring church. (413 U.S. at 480.)

In Ohio the tests are those prepared for, and used in the public schools.

The provision for field trip transportation is legally indistinguishable from the transportation found constitutional in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). It merely enables parents to get their children safely and expeditiously to and from school.

ARGUMENT

The State of Ohio May Properly Make Available To All School Children In The State The Benefits Of A General Program To Lend Textbooks Free Of Charge.

Appellants contend that the Ohio program for lending textbooks is broader than, and therefore distinguishable from, the programs upheld in *Board of Education* v. *Allen, supra,* 392 U.S. 236, and *Meek* v. *Pittenger, supra,* 421 U.S. 349. They did not make this contention in the District Court.

Section 3317.06(A) defines a textbook as any book or book substitute which is used as a text or text substitute in a particular class. Appellants concede that they stipulated that textbooks available under the statute would be limited to books, reusable workbooks or manuals. This is identical to the description of textbooks in the Pennsylvania statute upheld in the *Meek case.* Appellants claim, however, that this stipulation only goes to the intent and policies of the Department of Education.

Appellants claim that the Department may at some time in the future change its policies. The public officials may then try to use the term "book substitute" to furnish items which are constitutionally impermissible. They claim that this is a possibility because the appellees argued in the District Court that there was no realistic distinction between textbooks and instructional materials and equipment.

The state officials respectfully submit that the Ohio program is identical to the programs upheld in the *Meek* and *Allen cases.*

The reason that the parties stated that the stipulation concerning the implementation of the statute reflected only the intent and policy of the Department of Education was that the appellants challenged the statute on its face and obtained a temporary restraining order enjoining its implementation.

The statute has been implemented, however, since the judgment of the District Court on July 21, 1976. If there had been any instances during this time where public officials had attempted to furnish impermissible items as "book substitutes," the state officials feel that appellants would have brought such attempts to the Court's attention.

The state officials argued below, and are arguing in this Court that the loan of instructional materials and equipment, as well as the loan of textbooks is constitutional. This does not mean that they are contending that there is no distinction between textbooks and materials and equipment. The General Assembly of Ohio obviously felt there was a distinction between these items or it would not have made separate provisions for them in the statute.

The substance of appellants' argument apparently is that the public officials may at sometime in the future attempt to furnish items as "textbook substitutes" which this Court has held may not be provided. There is always a risk that a public official will consciously or unconsciously violate the law. This is not sufficient to invalidate the law. *Tilton* v. *Richardson,* 403 U.S. 672, 679 (1971); *Board of Education* v. *Allen, supra,* 392 U.S. at 245.

Appellants also claim that *Board of Education* v. *Allen, supra,* 392 U.S. 242; and *Meek* v. *Pittenger, supra,* 421 U.S. 349; should be overruled. The only argument which they

make in support of their claim is a reference to the dissenting opinion in those cases.

The state officials respectfully submit these decisions should not be overruled. The beneficiaries of the Ohio textbook loan program are the students or their parents and the public. Including all students in the textbook loan program benefits the public by improving the quality of all education in the state. The benefit, if any, to the sectarian schools which the students attend is incidental and remote. If the decisions were overruled, therefore, it would not serve the objectives of the Establishment Clause but it would impair the public interest.

The State Of Ohio May Properly Loan To Children In Non-Public Schools Secular Instructional Materials And Equipment Which Is Incapable Of Diversion To Sectarian Use.

Appellants argue in substance that the program for the loan of instructional materials and equipment is invalid because the materials and equipment involved are similar to those involved in the programs found invalid in *Meek* v. *Pittenger, supra,* 421 U.S 349; and *Public Funds For Public Schools* v. *Marburger,* 358 F.Supp. 29 (D. N.J. 1973) *affd.* 417 U.S. 961 (1974); that the distinction in beneficiaries of the aid is constitutionally insignificant; that the lending of instructional materials and equipment is not analogous to the lending of textbooks because the materials and equipment are stored on the school premises and they are not limited to items which can be distributed to individual pupils.

The District Court distinguished the Ohio program from the programs found invalid in the *Meek* and *Marburger cases* on the basis of the distinction in the beneficiaries of the aid. The sectarian schools were the direct

beneficiaries in *Meek* and *Marburger*. The materials and equipment were loaned to the sectarian schools themselves.

In Ohio the sectarian schools receive no materials or equipment. They are loaned to the school children or to their parents. The beneficiaries of the aid are, therefore, the school children or their parents and not the sectarian schools.

The fact that such materials and equipment are available to children in non-public schools may make it more likely that parents may choose to send their children to such schools. This Court has stated, however, that this is not sufficient to invalidate the program. *Board of Education* v. *Allen*, *supra*, 392 U.S. at 244; *Meek* v. *Pittenger*, *supra*, 421 U.S. 360.

Appellants cite portions of the opinions in *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), in support of their claim that the beneficiaries of the aid are not constitutionally significant.

Both of those cases involved financial assistance, reimbursement grants in *Lemon;* and financial aid for maintenance and repair, reimbursement grants and income tax credits in *Nyquist*. This type of aid, by its nature, necessarily presents a risk either of advancing religion or of fostering excessive entanglement. In the absence of restrictions financial aid could be used to benefit either the educational or the religious functions of the sectarian schools. If such restrictions were imposed, it would require continuing and intrusive government surveillance to insure compliance with the restrictions.

The instructional materials and equipment available under Ohio law do not present this problem. They are required to be inherently secular and incapable of diversion to sectarian use. The materials and equipment need

to be examined only once to insure that their content is secular and incapable of diversion to sectarian use. There is no need for any further government involvement.

Appellants in their Brief continually disparage the loan program by referring to the materials and equipment as "ostensibly loaned" and to the program as a "legislative feint" and a "fiction." The only reasons they give for this characterization is that the program is not limited to items which can be distributed to individual pupils and that the statute authorizes the storage of the materials and equipment on the premises of the non-public school.

The state officials respectfully submit that whether or not particular instructional materials may be distributed to individual pupils should have no legal significance. The textbooks are expected to be available for the individual use of each pupil. Their only educational value, however, comes from their group use by the pupils in class. In fact the parties have stipulated that only those textbooks may be loaned which are to be used as the principal source of study material for a given class. (Stip. 20, App. 35-36.)

Whether or not a piece of instructional material is distributed to an individual pupil has nothing to do with whether he is the beneficiary of the aid. In some instances the parent would purchase the materials for his child if they were not loaned by the state. Appellants apparently concede that in this situation the benefit of the loan is to the child and not the sectarian school.

In other instances if the material or equipment were not loaned by the state, it would not be available at all. The state officials respectfully submit that the loan of these materials is even more important not only to the child but also to the state. If the child does not have available materials which educators feel are beneficial, he will not be able to obtain the education he otherwise could have had.

Besides the harm to the individual pupil, this would also result in harm to the public interest. It is in the public interest for each child in the state to obtain the best education possible.

The fact that the materials and equipment are stored on the school premises should have no effect on the validity of the program. The same was true of the textbooks in both New York and Pennsylvania. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 361 n. 9.

The State Of Ohio May Properly Provide Diagnostic Services To All School Children In The State.

Appellants concede that the state may include non-public school children in programs providing physician, nursing, dental and optometric services. They contend, however, that diagnostic services to identify children with speech and hearing handicaps or psychological problems are not permitted.

In support of this contention appellants argue that public teachers and counsellors may not provide auxiliary services on the premises of a sectarian school; and that diagnostic speech and hearing and psychological services involve more communication than physician services.

The state officials recognize that *Meek* v. *Pittenger*, *supra*, 421 U.S. 349, held that the state could not provide auxiliary services on the premises of the sectarian school. The state officials submit, however, that there is an important distinction between the auxiliary personnel in *Meek* and the diagnostic personnel in this case. The auxiliary personnel were providing educational services. This was the reason the program was found unconstitutional. The opinion explains that since the auxiliary services were important educational services, if they are performed in schools in which education is an integral part of the sectarian mission,

there is some potential for the fostering of religion. (421 U.S. at 371-372.)

The services performed by the diagnostic personnel have nothing to do with education. The parties have stipulated that the persons who perform these services merely identify the children who have speech and hearing handicaps or psychological problems. (Stip. 28(a), (b), App. 39.)

These diagnostic services, like those provided by a physician or nurse, are public health services. The state may properly include children attending non-public schools in programs providing such services. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 364 and 371 n. 21; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616.

The State Of Ohio May Properly Include Children Attending Non-Public Schools In Programs Providing Therapeutic And Remedial Services So Long As They Are Performed In Public Facilities.

The statute provides for therapeutic and remedial services for all students who require special treatment or assistance. Most of these students in public schools will receive the services in the school which they attend. Students in the non-public schools will receive the services in a public school, a public center or a mobile unit. The location will depend upon the distance between the non-public school and a public school or a public center, the safety of travel between the non-public school and the public school or public center and the accommodations in the public school or public center.

Appellants concede the validity of providing such services in public schools. They claim, however, that it is unconstitutional to provide the services in public centers or mobile units. In support of their claim they argue that

when mobile units are used to provide the services they will probably be stationed on public property close to a non-public school and the personnel will usually be providing services solely to non-public school students; that it is unlikely that public school students will receive services at a public center; and that substantial funds may be expended to erect public centers to provide these services.

The state officials respectfully submit that this program does not present any risk of fostering religion; that the arguments raised by appellants have no legal significance; and that these services are constitutional.

This Court in *Meek* v. *Pittenger, supra,* 421 U.S. 349, held that the state could not provide auxiliary services on the sectarian school premises. It found that there would be a constitutionally impermissible degree of entanglement between church and state in order for the state to be certain that the auxiliary service personnel did not advance the religious mission of the schools in which they served. The opinion makes it clear that the risk that such personnel would attempt to foster religion and the resulting need for state surveillance arose because the services were provided in sectarian schools.

> But they are performing important education services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (421 U.S. at 371.)

The General Assembly of Ohio has eliminated any potential for fostering religion by providing that therapeutic or remedial services may only be provided in public facilities.

The fact that the mobile units may be parked close to a non-public school should have no effect on the validity of the services. The state officials respectfully submit that

a restriction on access to the services for certain students merely because they choose to attend sectarian schools would raise serious problems under the free exercise clause.

The fact that the personnel in a mobile unit or a public center may be providing the services solely to children attending a non-public school should also have no effect on the validity of the services. The services will still be provided in common to all students who have need of them. The only difference will be the location in which they receive the services.

This situation is not analogous to the situation in which the services are provided in the sectarian school. The centers or mobile units obviously do not maintain an "atmosphere dedicated to the advancement of religious belief." It is unrealistic to assume that a person rendering a remedial or therapeutic service will be so affected by the religious beliefs of the students receiving the service that he would be tempted to advance those beliefs. Even if there were a possibility that the personnel would be so affected, it would not be affected in any way by the statute. The same possibility would exist whether the students attended public or non-public schools and whether the services were performed in a public school, public center or mobile unit.

The construction of a center to provide therapeutic or remedial services would appear to be permissible. See, e.g., *Hunt* v. *McNair,* 413 U.S. 734 (1973). However, that issue is not raised in the instant case. Nothing in the statute authorizes the expenditure of funds for capital improvements.

No therapeutic or remedial services will be provided on the premises of non-public schools in Ohio. There is, therefore, no possibility that the auxiliary personnel will be affected by the religious atmosphere of a sectarian

school and no potential for fostering of religion. There would also be no possibility of provoking controversy between the auxiliary personnel and religious authorities over the services provided.

The State Of Ohio May Properly Use Standardized Tests And Scoring Services In Order To Measure The Progress Of Non-Public School Students In Secular Subjects.

Appellants claim that it is unconstitutional for the local school districts to provide standardized tests and scoring services to measure the progress of non-public school students in secular subjects. In support of their claim they rely upon *Levitt* v. *Committee For Public Education*, 413 U.S. 472 (1973).

The New York statute involved in *Levitt* provided direct money grants to reimburse non-public schools for a variety of state required services. The most expensive service was the administration and grading of tests and the compiling and reporting of their results.

This Court explained that there were two constitutional defects in the New York program. The first arose because of the form of aid, direct money grants to the schools. Such aid, in the absence of excessive government entanglement with religion, is incapable of restriction to purely secular use. (413 U.S. at 477.)

The other problem was that most of the tests involved were traditional teacher prepared tests. Such tests are an integral part of the teaching process. Since the tests were prepared by teachers under the authority of sectarian institutions there was a risk that they would be drafted with an eye to advancing the views of the sponsoring church. (413 U.S. 480.)

The statute provided a lump sum per pupil amount for a variety of services, some of which were secular and some religious. This Court, therefore, stated that it could not reduce the amount to that corresponding to the costs incurred in performing the reimbursable secular services. (413 U.S. at 482.)

Neither constitutional problem is present in Ohio. No financial aid is involved. The tests and scoring services themselves are provided. These tests are not prepared by teachers employed by sectarian schools. They are prepared for, and used in the public schools.

The parties have stipulated that the tests are used to measure the progress of students in secular courses. The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

The State Of Ohio May Properly Provide Transportation For Field Trips For All Children In The State, Those In Non-Public As Well As Public Schools.

Appellants claim that the provision for field trip transportation under the Ohio law is distinguishable from the transportation found constitutional in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). They argue that transportation of students to and from governmental, industrial, cultural and scientific centers (Stip. 38, App. 49) is more directly related to the education of the students than transportation to and from their classroom. They also argue that, because the occasions for field trip transporta-

tion are more difficult to anticipate there will be a greater potential for entanglement.

The state officials respectfully submit that the distinctions urged by appellants have no merit. The claim that field trip transportation is more directly related to education than classroom transportation is doubtful. In any event, in either situation, the program merely provides safe and expeditious transportation of students to and from school. *Everson* v. *Board of Education, supra*, 330 U.S. at 18.

The extent of transportation for field trips does not depend upon the "unilateral determination" of the non-public school administration. The statute limits the transportation available to non-public school students to that which is provided to the public school students in the district.

The state officials also submit that the fact that the need for field trip transportation is only occasional will cause fewer, not more, potential conflicts between non-public and public school students. The bussing needs for field transportation, as well as classroom transportation, can be anticipated and scheduled well in advance of the school year. Since field trip transportation is so infrequent it is unlikely that any potential conflicts will appear. If they do, and they cannot be immediately resolved, the school district may contract for the needed transportation.

The state officials respectfully submit that this portion of the statute is constitutionally indistinguishable from the program found constitutional in *Everson* v. *Board of Education, supra*, 330 U.S. 1.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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